

ORIGINAL

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, DC 20554

RECEIVED

APR - 9 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
STATE OF MINNESOTA, Acting by and )  
Through the MINNESOTA DEPARTMENT )  
OF TRANSPORTATION and the )  
MINNESOTA DEPARTMENT OF )  
ADMINISTRATION )  
)  
Petition for Declaratory Ruling Regarding the )  
Effect of Sections 253(a), (b), and (c) of the )  
Telecommunications Act of 1996 on an Agree- )  
ment to Install Fiber Optic Wholesale Transport )  
Capacity in State Freeway Rights-of-Way )

CC Docket No. 98-1

DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF U S WEST, INC.**

U S WEST, Inc. ("U S WEST") hereby submits the following brief reply comments in the above captioned proceeding.<sup>1</sup> As discussed in more detail below, U S WEST submits that a review of the comments demonstrates that the Commission should preempt the "Agreement to Develop and Operate Communications Facilities" by and between the Departments of Transportation and Administration (collectively, "Minnesota") and ISC/UCN LLC ("the Developer") and Stone & Webster. In support thereof, U S WEST states the following:

The approximately 44 comments filed can readily be characterized either as supporting or opposing the Petition for Declaratory Ruling filed by the State of Minnesota, by and through the Departments of Transportation and Administration (jointly "Minnesota"). The supporting parties are state governmental entities which clearly have a vested interest in the

---

<sup>1</sup> See "Commission Seeks Comment on Minnesota Petition for Declaratory Ruling Concerning Access to Freeway Rights-of-Way Under Section 253 of the Telecommunications Act," CC Docket No. 98-1, *Public Notice*, DA 98-32 (rel. Jan. 9, 1998); see also "Revision of Previously Set Comment Dates," DA 98-236 (rel. Feb. 6, 1998).

No. of Copies rec'd 0812  
LIST A B C D E

Commission approving Minnesota's efforts to auction access to public ROWs to the highest bidder. The comments filed by these entities, however, were extraordinarily brief and provided no new evidence or arguments in support of Minnesota's Petition. Indeed, many of the comments were one page in length and were based upon a generic comment letter originally drafted and circulated by Minnesota. Simply put, the governmental entities predictably argue that the Minnesota Agreement represents a reasonable balance between the governmental interests in ensuring public safety and managing public ROWs and the benefits derived from the telecommunications industry.

While U S WEST does not contest the general proposition that Section 253 of the Communications Act requires a balance of interests between state and local governments and the telecommunications industry, U S WEST does not concur that the Agreement is a reasonable balance of these interests. Numerous other commenters<sup>2</sup> submitted detailed comments demonstrating that the Agreement is inconsistent with Sections 253(a), (b), and (c). U S WEST supports these opposing comments and urges the Commission to preempt the Agreement.

As demonstrated by the opposing comments, the Commission cannot find that the Agreement is consistent with Section 253(a). The Agreement grants to a single entity exclusive rights to construct, install and operate a fiber optic communications system longitudinally within

---

<sup>2</sup> Opposing commenters represent a remarkable coalition of incumbent local exchange carriers, competitive local exchange carriers, interexchange carriers, cable providers and various telecommunications trade associations. *See, e.g.*, Comments of Ameritech, Comments of KMC Telecom Inc. and KMC Telecom II Inc., Comments of MCI Telecommunications Corp., Comments of MFS Network Technologies, Inc., Opposition of Minnesota Telephone Association, Comments of National Cable Television Association, Comments of New York State Telecommunications Association, Inc., Comments of Nextlink Communications, Inc., Comments of United States Telephone Association, Comments of U S WEST, Inc., and Comments of Virginia Telecommunications Industry Association.

the specified freeway ROWs. Further, the alternative means of providing service referenced by Minnesota (alternative ROWs for installing fiber, collocating fiber in the freeway ROW, or reselling service) do not give competing carriers meaningful access to the ROWs and to the markets located along the ROWs. Moreover, this exclusive ROW access could continue for 20 years or more. In other words, the Agreement would “lock up” access to public freeways for more than 20 years, excluding all but one carrier from the shortest, most direct route to serve communities located along those freeways.

Opposing commenters agree that the exclusive access provisions of the Agreement will have the effect of prohibiting entities from providing telecommunications service.<sup>3</sup>

For example, the affidavit of Strategic Policy Research, Inc. concludes that:

granting exclusive access to previously unavailable rights-of-way would foreclose wholesale competition and, thus, impede retail competition along many of the most direct and convenient routes between cities in Minnesota. Moreover, the Agreement provides no adequate safeguards against a variety of potential anti-competitive abuses that could arise.<sup>4</sup>

Opposing commenters agree further that the Agreement cannot be justified under Section 253(b), because it fails to satisfy the “competitively neutral” and “necessary” standards of that provision.<sup>5</sup> For example, MFS Technologies, Inc. and the Minnesota Telephone

---

<sup>3</sup> See, e.g., Comments of Association of Local Telecommunications Services at 12-15; Comments of KMC Telecom, Inc. at 2-6; Comments of Nation Cable Television Association at 4-11; Comments of RCN Telcom Services, Inc. at 4-7; Comments of United States Telephone Association at 8-10; Comments of GTE at 6-10; Comments of Teleport Communications Group, Inc. at 11-14.

<sup>4</sup> Affidavit of Strategic Policy Research, Inc., Exhibit 3, Opposition of Minnesota Telephone Association at 2; 6-7 (“SPR Affidavit”).

<sup>5</sup> See, e.g., Comments of KMC Telecom, Inc. at 6-8; Comments of Nextlink at 6-10; Comments of Teleport Communications Group, Inc. at 18-19.

Association submitted declarations and affidavits demonstrating that exclusive access to freeway ROWs will have real and serious competitive consequences. These affidavits show the distinct competitive advantages which arise from constructing a telecommunications network over freeway ROW's, as opposed to other rights of way. Mr. Eide, Senior Vice President, Network Systems Sales, MFS Technologies, Inc., estimates that the cost of access freeway ROWs can be 30% less than the costs of accessing alternative ROWs.<sup>6</sup> Mr. Kenneth D. Knuth, President, Finley Engineering Company estimates that nearly all cable placed on the freeway ROWs would involve rural type construction and could be placed for approximately \$1.00-\$1.25 per foot.<sup>7</sup> By contrast, cable placed on state highway ROWs would involve approximately 15% town or city type construction and only 85% rural type construction.<sup>8</sup> The placement costs for town or city type construction are much greater and estimates range from \$2.50-\$5.00.<sup>9</sup>

Further, Mr. Knuth and Mr. Eide both state that utilizing railroad, pipeline, or power line ROWs will likely be extraordinarily expensive and time-consuming.<sup>10</sup> Mr. Eide also notes that use of the freeway ROWs will provide a significant advantage in speed to market and "[t]he company that deploys services before its competitors in today's telecommunications market tends to be more successful."<sup>11</sup> U S WEST has independently reviewed these affidavits

---

<sup>6</sup> Declaration of Robert Eide, Exhibit A, Comments of MFS Technologies at ¶¶ 10-14 ("Eide Declaration").

<sup>7</sup> Affidavit of Kenneth D. Knuth, Exhibit 4, Opposition of Minnesota Telephone Association at ¶¶ 3, 5-6.

<sup>8</sup> *Id.* at ¶¶ 3, 9.

<sup>9</sup> *Id.* at ¶¶ 3, 7-10.

<sup>10</sup> *Id.* at ¶¶ 12-13; Eide Declaration at ¶¶ 16-20.

<sup>11</sup> Eide Declaration at ¶ 15.

and confirmed that the cost differentials for laying fiber in freeway ROWs as opposed to alternative ROWs are generally reflective of U S WEST's costs for laying fiber in Minnesota.<sup>12</sup>

Moreover, as discussed in Mr. Dorff's Declaration attached hereto, the placement of fiber in the alternative ROWs has a greater risk of damage and thus incurs additional costs over the long term when compared to fiber placed in freeway ROWs.<sup>13</sup>

Since freeways and their associated rights-of-way are originally designed, and built, to ultimate specifications, there is no need to move fiber facilities once they have been placed initially. In Minnesota, U S WEST has spent millions of dollars over the years relocating, guarding, and repairing its facilities due to road reconstruction activity.<sup>14</sup>

Consequently, U S WEST agrees that a company using freeway ROWs will have substantial cost and competitive advantages over companies using alternative ROWs.

Further, as the SPR Affidavit makes clear, these competitive distortions cannot be justified based upon public safety concerns. Simply put, "it is not necessary to grant exclusive access to a single entity in order to meet the State's concerns about public safety and minimization of traffic disruption."<sup>15</sup> As SPR states, fiber systems:

are easy to install, needing only to be dropped into a narrow trench along the edge of the right-of-way . . . [I]f normal permitting procedures were allowed for the provision of fiber optic systems along interstate highways, there would only be the minimal impact of plowing or digging a narrow trench and dropping a cable into it upon installation . . . In short, there is no more (and probably less)

---

<sup>12</sup> See Declaration of Dennis J. Dorff, Engineering Manager, U S WEST Communications, Inc. ¶ 5, appended hereto as Exhibit A. Mr. Dorff has many years of extensive experience regarding Minnesota ROW and telecommunications construction issues.

<sup>13</sup> *Id.* at ¶ 6.

<sup>14</sup> *Id.*

<sup>15</sup> SPR Affidavit at 2.

reason to restrict modern fiber systems from being installed in the rights-of-way of interstate highways than there is to restrict installation of telecommunications facilities . . . along trunk highways.<sup>16</sup>

Consequently, the Agreement cannot be justified under Section 253(b).

Finally, opposing comments also support the conclusion that the Agreement cannot be justified as permissible ROW management under Section 253(c).<sup>17</sup> Instead, the Agreement does not appear to be ROW management at all, but rather is a contract for the provision of telecommunications infrastructure and services, in which exclusive access to freeway ROWs is provided as consideration. Indeed, the RFP, which preceded the Agreement, states that Minnesota “wishes to barter exclusive rights to freeway right of way in exchange for capacity to satisfy immediate and future state needs.”<sup>18</sup> Simply put, both the RFP and the Agreement “clearly evidence[] Minnesota’s abdication of whatever right-of-way management authority it might have in return for the monetary benefit” of fiber capacity to be installed under the Agreement.<sup>19</sup> Moreover, assuming that the Agreement constitutes an exercise of ROW management authority, it is not “competitively neutral” as demonstrated above.

Similarly, while free fiber capacity in exchange for ROW access may be comparable to compensation it is clearly not “competitively neutral,” as demonstrated above. In this regard, the Minnesota House of Representatives has suggested that the compensation

---

<sup>16</sup> *Id.* at 2-3. Mr. Dorff agrees with this assessment. *See* Exhibit A ¶ 7.

<sup>17</sup> *See, e.g.*, Comments of GTE Service Corporation at 10-12; Comments of MCI at 5; Comments of Minnesota Telephone Association at 52-56; Comments of National Cable Television Association at 11-14; Comments of SBC Communications, Inc. at 7-8; United States Telephone Association at 12-13.

<sup>18</sup> Opposition of Minnesota Telephone Association, Exhibit 1 at 1.

<sup>19</sup> Comments of GTE at 12.

received by Minnesota under the Agreement may violate state statutes regarding the rental of real estate.<sup>20</sup> Insofar as the Agreement is not competitively neutral, it does not satisfy the standards set forth in Section 253(c) and may not be justified under that provision.

For the foregoing reasons, and for the reasons set forth in its Comments, U S WEST submits that the Commission cannot endorse the Agreement. Given the extraordinary duration for which Minnesota has granted exclusive access to the freeway ROWs, the Commission cannot determine that the exclusive ROW access arrangement will not constitute an entry barrier, either now or in the future. Further, the Agreement effectively transfers control over access to the freeway ROWs to a single competing carrier, and therefore is not competitively neutral. As a consequence, the Agreement is not permissible under Section 253(b) or (c).

---

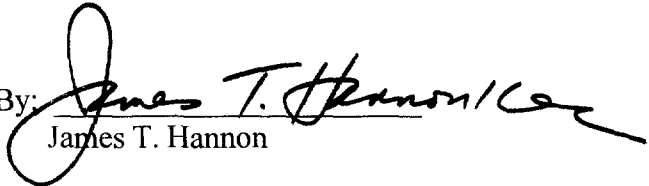
<sup>20</sup>

Comments of Minnesota House of Representatives at 1.

Thus, U S WEST urges the Commission to deny Minnesota's Petition and preempt the Agreement.

Respectfully submitted,

**U S WEST, Inc.**

By:   
James T. Hannon

U S WEST, Inc.  
Suite 700  
1020 19th Street, N.W.  
Washington, DC 20036  
(303) 672-2860

Its Attorney

Of Counsel,  
Daniel L. Poole  
U S WEST, Inc.

Luisa L. Lancetti  
Jeffrey S. Bork  
Wilkinson, Barker, Knauer & Quinn, LLP  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 783-4141

April 9, 1998



## Exhibit A

## DECLARATION

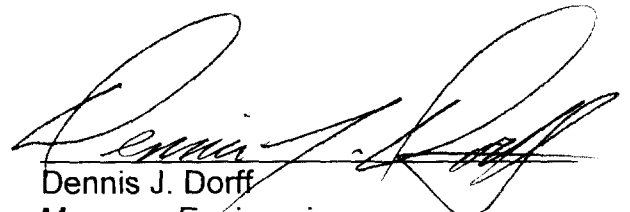
Dennis J. Dorff declares that:

1. My name is Dennis J. Dorff. I am the Engineering Manager for U S WEST Communications, Inc. My business address is 500 North Carlton Street, Maplewood, Minnesota 55119.
2. In my position for U S WEST, I am responsible for the management of twenty eight field engineers and a six member support staff across the state of Minnesota. In this capacity, I am responsible for the design of outside plant infrastructure associated with new developments and commercial buildings for both residence and business services. I am also responsible for resolving all infrastructure issues involving public right-of-way activity and/or private property owners. My group serves as the primary point of contact with municipalities and governmental agencies. The procurement and administration associated with permits and right-of-way acquisition for infrastructure placement are also part of my overall responsibility. Consequently, I am familiar with the issues, procedures, and problems associated with the procurement and resolution of right-of-way issues throughout the state of Minnesota. Throughout my twenty seven years of telecommunications experience, I have been employed by U S WEST in the state of Minnesota. I have been in my current position from 1994 to the present. Prior to my current position, I was an Engineering Manager for the Minnesota Minneapolis-St. Paul metropolitan area operations from 1981 to 1994. From 1979 to 1981, I was the Minnesota Area Construction Staff Manager. Prior to that time frame, I was employed as a Construction supervisor and a Local Area Manager in various locations within the State of Minnesota since 1971.
3. I have reviewed the following documents filed with the Federal Communications Commission in CC Docket No. 98-1: (a) the Reply Comments of U S WEST, Inc.; (b) the affidavit of Strategic Policy Research, Inc. on behalf of the Minnesota Telephone Association; (c) the affidavit of Mr. Kenneth D. Knuth, President of Finley Engineering Company on behalf of the Minnesota Telephone Association; (d) the Declaration of Mr. Robert Eide, Senior Vice President, Network Systems Sales for MFS Network Technologies, Inc. and (e) the Petition for Declaratory Ruling filed by the State of Minnesota by and through the Department of Transportation and the Department of Administration. I am familiar with the information contained therein.
4. The information contained in the foregoing Reply Comments of U S WEST is true and accurate to the best of my knowledge and belief.
5. Further, I have determined that the cost differentials for laying fiber in freeway ROWs as opposed to alternative ROWs presented in the affidavit of Mr. Knuth and the Declaration of Mr. Eide generally correspond to U S WEST's estimates regarding the cost differentials for laying fiber in different ROWs in Minnesota.
6. Additionally, I would like to point out that the placement of fiber in other types of right-of-way can, and will, incur additional costs and risks of damage in the long term due to road reconstruction and other improvements. Since freeways and their associated rights-of-way are originally designed, and built, to ultimate specifications, there is no need to move fiber facilities once they have been placed initially. In Minnesota, U S WEST has spent millions of dollars over the years relocating, guarding, and repairing its facilities due to road reconstruction activity.

7. Finally, I concur with the conclusions of the Strategic Policy Research affidavit that the installation of fiber optic systems along interstate freeways should have only minimal impacts resulting from plowing or digging trenches and placing the fiber therein.
8. This concludes my declaration.

Pursuant to 47 C.F.R. 1.16, I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed this 18<sup>th</sup> day of March, 1998.



Dennis J. Dorff  
Manager-Engineering  
U S WEST Communications

## CERTIFICATE OF SERVICE

I, Shelia L. Smith, hereby certify that on this 9th day of April 1998, copies of the foregoing Reply Comments of U S WEST, Inc. were served on the following by first-class postage-prepaid mail:

\*The Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

\*Janice M. Myles  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, D.C. 20554

\*The Honorable Harold W. Furchtgott-Roth  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

\*International Transcription Services  
1231 20th Street, N.W.  
Washington, D.C. 20036


\*The Honorable Michael K. Powell  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Steve Wilensky  
Assistant Attorney General  
1200 NCL Tower  
St. Paul, MN 55101

\*The Honorable Susan Ness  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

Donald J. Muetting  
Assistant Attorney General  
525 Park Street, Suite 200  
St. Paul, MN 55103

\*The Honorable Gloria Tristani  
Federal Communications Commission  
1919 M Street, N.W., Room 826  
Washington, D.C. 20554

  
\_\_\_\_\_  
Shelia L. Smith

\*By Hand